IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-82

FAMOUS FOODS, INC.,
Petitioner

v.

GENERAL FOODS CORPORATION,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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July 20, 1976

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The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on June 1, 1976.

OPINION BELOW

The opinion of the United States Court of Appeals, not yet reported, appears in the Appendix to this petition. The judgment and order of the District Court dated August 26, 1975 appears in the Appendix to this Petition. The opinion of the United States Court of Appeals for the Third Circuit in *Three Rivers Motors Co. v. Ford Motor Co.*, 522 F.2d 885 (3d Cir. 1975) appears in the Appendix to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on June 1, 1976 and this petition for certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C., section 1254(1).

QUESTIONS PRESENTED

1. Whether federal courts have discretion to apply either state common law or federal common law to releases incidental to or an integral part of alleged violations of the federal antitrust laws.

2. Whether the unknowing, unintentional and unwitting release of retrospective and prospective antitrust claims violates public policy and is inimical to the federal statutory scheme of private enforcement of the federal antitrust laws.

3. Whether a general release may serve as a partial release of alleged antitrust violations where there is a continuum of antitrust violations, unaffected and uninterrupted by said release.

STATEMENT OF THE CASE

The questions presented arise from an antitrust action instituted by petitioner, Famous Foods, Inc., a family-held Pennsylvania corporation, against respondent, General Foods Corporation, a Delaware corporation with its corporate headquarters at White Plains, New York. The basis of the antitrust complaint is that General

Foods' MFSA program constitutes resale price maintenance (vertical price fixing) in violation of section 1 of the Sherman Act, which MFSA program was held to be a *per se* violation of the Sherman Act by the United States Court of Appeals for the Fifth Circuit in *Greene v. General Foods Corporation*, 517 F.2d 635 (5th Cir. 1975).

As a partial defense, General Foods Corporation (hereafter General Foods) pleaded a release dated September 7, 1972. For the preceding 20 years, Famous Foods, Inc. (hereafter Famous Foods) had been an independent coffee distributor of General Foods, reselling coffee and food products in the institutional market. On September 7, 1972 it had ceased being a coffee distributor but continued, as an independent wholesaler, to resell General Foods brand *food* products until June 15, 1973, when all business relations between the parties terminated.

Under the MFSA program, Famous Foods resold products it owned and had purchased from General Foods to various institutional accounts, *i.e.*, hotels and restaurants, as distinguished from grocery stores. General Foods designated certain of those institutional accounts as Multiple Food Service Accounts (MFSA's) and entered into agreements with some MFSA's that gave the MFSA the right to buy General Foods brand products at a set or agreed price. Famous Foods resold the products it owned to MFSA's at the price fixed by General Foods, using a special (three party) MFSA invoice set. On other institutional accounts, Famous Foods resold

on its own invoices at prices it determined.

The resale to MFSA's of the General Foods products after September 7, 1972 was handled by Famous Foods in a fashion identical to the MFSA transactions prior to September 7, 1972.

General Foods moved for summary judgment predicated upon the release. Famous Foods formally opposed the motion and filed affidavits and depositions. The surrounding circumstances of the execution of the release concerned only the sale of the *coffee portion* and coffee customers of petitioner's business. After the execution of the release, petitioner ceased being an H & R Coffee Distributor, but continued to sell and distribute General Foods brand products as an institutional wholesaler in accordance with the MFSA program. At the time of the release in question the individual executing the release for Famous Foods was unaware of any possible antitrust violations by General Foods, or that the MFSA program was illegal under the Sherman Act. (However, a federal antitrust suit on the same basis as the present action had been filed in September of 1971 against General Foods by a former distributor, which later resulted in the Fifth Circuit holding "that General Foods MFSA system constitutes a *per se* price fixing violation of §1 of the Sherman Act." *Greene v. General Foods Corporation*, 517 F.2d 635, 658 (5th Cir. 1975)).

It is uncontroverted that the release did not expressly release "unknown

claims;" nor were there any negotiations or added consideration for release of such claims. It is likewise undisputed that, in reference to the alleged antitrust violations which existed both before and after the release, no discussion or negotiation occurred between the parties. No previous dispute had arisen between the parties in reference to any suggested antitrust violations. Famous Foods was not represented by counsel in reference to the release or the selling of its coffee business to General Foods. The release in question was drafted by General Foods' counsel and there was no consideration for releasing any antitrust claims.

After reargument by the parties in light of *Three Rivers Motors Co. v. Ford Motor Co.*, 522 F.2d 885 (3d Cir. 1975), the District Court granted a partial summary judgment based upon the release in favor of General Foods. The effect of the Order was to bar all damage claims for the time preceding September 7, 1972, (the date of the release) but not for the time between that date and June 15, 1973, when all business relations between the parties terminated.

The trial court certified the release issue, pursuant to 28 U.S.C. § 1292(b), to the United States Court of Appeals for the Third Circuit, which affirmed the decision of the District Court in an unreported *per curiam* opinion dated June 1, 1976.

REASONS FOR GRANTING A WRIT

THE RULINGS BELOW CONFLICT WITH PRIN-

CIPLES OF DECISIONS BY THIS COURT AND INVOLVE IMPORTANT PRINCIPLES OF FEDERAL LAW THAT SHOULD BE RESOLVED BY THIS COURT.

A. FEDERAL COMMON LAW AS TO CONSTRUCTION OF RELEASES IS TO BE APPLIED IN FEDERAL ANTITRUST LITIGATION.

The case at bar, in its application of state laws to the general release, conflicts with the principles enunciated by this Court in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971); conflicts with the construction of Pennsylvania law as to the validity of releases by the United States Court of Appeals for the Tenth Circuit in *Wm. A. Smith Contracting Co., Inc. v. Travelers Indemnity Co.*, 467 F.2d 662 (10th Cir. 1972); is at variance with a decision within its own circuit as to Pennsylvania law (*In Re F. H. McGraw Company*, 473 F.2d 465 (1973)); and further, in its use of state law to determine the validity of a given release, conflicts with the decision of the United States Court of Appeals for the Fifth Circuit in *Redel's Inc. v. General Electric Company*, 498 F 2d 95 (5th Cir. 1974).

Such arbitrary application of state common law to matters arising under federal statutes destroys uniformity of federal law and prevents the even application of federal statutes. To avoid frustration of the purposes of the federal antitrust statutory scheme, federal common law, which augments and fosters such scheme, must apply.

1. THE THIRD CIRCUIT RULING FAILS TO

FOLLOW *ZENITH*.

The court below based its *per curiam* decision on *Three Rivers Motors Co. v. Ford Motor Co.*, 522 F.2d 885 (3d Cir. 1975). In that case, the court noted the holding of this Court in *Zenith* relating to the release of multiple tort feasors.

The *Three Rivers* court observed that, in matters relating to federal antitrust statutes, federal courts are competent to apply federal law to interpret a release. The court went on to conclude that, since Congress has not enacted a law for interpretation of antitrust releases, or indicated a preference for the use of state law, a federal court has the discretion to utilize either federal or state law. The court acknowledged the holding of *Zenith, supra*, that a uniform federal rule of interpretation applies to releases of multiple tortfeasors. But it attempted to constrict *Zenith* so that federal common law would apply to releases *only* when multistate conspirators are involved. Such a construction clearly vitiates the sound judicial policy enunciated in *Zenith*.

It is true that in *Zenith* this Court noted the inherent multistate character of antitrust litigation. In fact, it was that very character of antitrust litigation which prompted this Court to promulgate the uniform federal rule that a party releases only those parties whom he intends to release. 401 U.S. 321, 347 (1971).

Where a single defendant has business

dealings in every state of the union, as does General Foods, it defies logic to contend that the nature of the litigation is other than multistate. Certainly the vertical price fixing scheme of General Foods affects distributors and customers in a number of jurisdictions, and is one of the very practices which the federal statutes were designed to prevent. There is no effective difference between illegal acts of conspirators who are citizens of different jurisdictions, and illegal acts of a single defendant which are performed in many jurisdictions. It is the *nature* of the wrong which brings it within the purview of the federal antitrust statutes, and *not* the nature of the wrongdoer. To allow a court to arbitrarily decide to apply federal common law in one situation and state common law in the other permits the very chaos *Zenith* attempted to prevent.

While this Court in *Zenith* did not specifically decree that federal law should govern all aspects of releases in federal antitrust litigation, a contrary interpretation is illogical. It is unreasonable to assume that this Court intended federal common law to apply *only* to the construction of those releases involving multistate conspirators. It is far more reasonable to conclude that this Court intended federal common law to govern interpretation of *all* aspects of releases in antitrust litigation.

Further, the *Three Rivers* court's reason for choosing to apply state law, *i.e.*, that the state law involved was not dissimilar to the federal law, ignores the rationale behind *Zenith*. Had this

Court desired to rule that state law will apply when it is not dissimilar to federal law, it could easily have said so. Multiplicity of state law, whether similar or dissimilar to federal law, is the quagmire this Court intended to avoid.

2. THE THIRD CIRCUIT MISAPPLIED PENNSYLVANIA LAW.

Even if this Court were to endorse the distinction made in *Three Rivers* and followed by the court below, which resulted in the arbitrary application of state law, there would still be no assurance of uniform results in antitrust litigation. The *Three Rivers* court noted that in Pennsylvania "the general rule for construction of releases is that the intention of the parties must govern, *but* this intention *must* be gathered from the language of the release." (at 892, emphasis added) The court went on to find, based on the District Court's findings of fact, that though the releasor did not know of and did not intend to release antitrust actions, the general release included such antitrust claims. This decision is contrary to established Pennsylvania law.

In *Wm. A. Smith Contracting Co., Inc. v. Travelers Indemnity Co.*, the 10th Circuit noted that under Pennsylvania law "a release covers only those matters which may be fairly said to have been contemplated by the parties when the release is given, *Restifo v. McDonald*, 426 Pa. 5, 230 A.2d 199, 201; and that a release does not cover a claim unknown at the time of execution, *Cady v. Mitchell*, 208 Pa.Super. 16, 220 A.2d 373, 374-375." (467 F.2d 662, 665). Indeed, the Third Circuit itself in *In Re*

F. H. McGraw Company, 473 F.2d 465 (3d Cir. 1973), in a lengthy discussion of Pennsylvania law, concluded that Pennsylvania law "mandates strict construction of a release" such that where the intent of the parties is not clearly demonstrated, a release which operates as an absolute bar to recovery should not be given full force and effect (at 469). Thus, the interpretation of Pennsylvania law utilized by the Third Circuit in *Three Rivers* conflicts with its own interpretation of that law in other contemporaneous litigation, and conflicts with the interpretation of that same law by the Tenth Circuit.

It is apparent that, even if discretion exists to choose between federal and state law, conflicting views of state law are possible. In light of the patent conflict as to Pennsylvania law, it is difficult to imagine the basis of the following statement by the Third Circuit: "Irrespective of the variation among state laws interpreting releases, the contracting parties can readily couch their release agreement in terms compatible with whichever state's law is applicable. Thus, a nationally uniform interpretation rule would have little utility." (at 890) Had the parties to the present release drafted the release with the express intention of releasing antitrust claims, and with the express intention that the release be construed under Pennsylvania law, different results would still be possible in the Third and Tenth Circuits, and even *within* the Third Circuit. The present case clearly demonstrates the need for a nationally uniform rule of interpretation of releases of antitrust claims.

The decision of the *Three Rivers* court and the court below to apply state common law to a general release in antitrust litigation is in direct conflict with *Redel's Inc. v. General Electric Company*, 489 F.2d 95 (5th Cir. 1974). In *Redel*, the court reviewed the decisions of this Court in *Aro Manufacturing Co. v. Convertible Top Co.*, 377 U.S. 476 (1964) and *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), and concluded that "a release of a federally created statutory claim raises pervasive federal questions which should be determined by a uniform federal rule of construction rather than various state rules." (fn. 2, at 99) That court further determined that the federal rule derived from those cases is that the "interpretation of any release of antitrust liability must be governed by the intent of the parties." (at 98) The court noted that in the *complete* absence of ambiguity, the jury may not consider extrinsic evidence in order to determine the scope of a release. However, the court went on to caution that it did not condone "the use of the general release as a device to immunize parties with superior economic power from the penalties and restraints imposed by the enforcement of our antitrust laws." (at 100)

The *Redel* court found, under the factual situation with which it was faced, that the release there involved was intended to, and did, retrospectively release the antitrust claims; however, its decision was reached through an application of principles of federal law, as mandated by this Court in *Zenith*. Had the court below followed the dictates of *Zenith*, and

applied federal law to the fact situation of Famous Foods, the outcome of the litigation below would have been significantly different, for there is not the least indication that Famous Foods intended to release its antitrust claims, or indeed *any* unknown claims, against General Foods.

B. UNKNOWING AND UNINTENTIONAL RETROSPECTIVE AND PROSPECTIVE RELEASE OF ANTITRUST CLAIMS IS ADVERSE TO PUBLIC POLICY.

The state of the law, both generally, and specifically in the antitrust context, is clear that where a party to a release is ignorant of possible liability of the release, and does not intend to release unknown claims, the release is not valid as to such claims.

In *Union Pac. Ry. Co. v. Artist*, 60 F. 365 (1894), a release "of and from all manner of actions, causes of actions, claims and demands whatsoever, from the beginning of the world to this day" was not sufficient to include injuries not specified and not known to exist at the time the release was executed.

"It is essential to the validity of a written release of liability that it be executed with knowledge of the facts and with an intention to release an existing or asserted liability." *Penn Mutual Life Ins. Co. v. Ashton*, 93 F.2d 565, 568 (10th Cir. 1937). And this Court has held that "the effect of a release upon conspirators shall be determined in accordance with the intentions of the parties." *Zenith Radio Corp. v. Hazeltine Research,*

Inc., 401 U.S. 321, 345-46.

William H. Hodill, president of Famous Foods, Inc., in an affidavit accepted into evidence in the United States District Court for the Western District of Pennsylvania, swore that at the time he executed the release in favor of General Foods he had no knowledge of any antitrust claim which Famous Foods, Inc. may have had against General Foods. This fact alone is sufficient under existing law to challenge the validity of the release as to unknown claims. As noted by the court in *Redel's*: "While not an absolute requirement, antitrust policy certainly encourages the parties to a general release to evidence their intention to release antitrust claims." (498 F.2d 95 at 101) No evidence of such intention in the present case existed.

The record indicates that, although Famous Foods was unaware of possible antitrust claims, General Foods did not obtain the release in ignorance of its potential liability. When asked about negotiations leading to the sale by Famous to General Foods and the required release, Gordon Stoff, who developed marketing programs for distributors of General Foods products, testified "it was always in our mind from the beginning of the negotiation that Mr. Hodill could bring up something like this [antitrust violations]." Some courts have suggested that ignorance on the part of the releasor, combined with knowledge of liability by the releasee, may result in the release itself becoming part of the antitrust scheme. *See, e.g., Redel's Inc. v. General Electric Company*, 498 F.2d

95, 101 (1974); *Dobbins v. Kawasaki Motors Corp.*, 362 F.Supp. 54, 58 (D. Or. 1973); *Taxin v. Food Fair Stores, Inc.*, 287 F.2d 448, 451 (3d Cir. 1961); *Fox Midwest Theatres v. Means*, 221 F.2d 173, 180 (8th Cir. 1955); *S. E. & Rondon Co. v. Atlantic Richfield Co.*, 288 F.Supp. 879, 882 (C.D. Cal. 1968); *California Concrete Pipe Co. v. American Pipe & Construction Co*, 288 F.Supp. 823 (C.D. Cal. 1968); *Carter v. Twentieth Century-Fox Film Corp.*, 127 F.Supp. 675 (W.D. Mo. 1955).

The *Taxin* court concluded that a release could not facilitate any restraint of trade which had already been accomplished and that a suit could be maintained for damages arising after the date of the release. Petitioner submits, however, that where it is the intention of the releasee to continue its course of antitrust violations with the belief that it cannot be held to account for its wrongdoing, such a release is an integral part of its overall scheme of antitrust violations. And, as noted by the Eighth Circuit in *Fox Midwest Theatres v. Means*, 221 F.2d 173, 180 (8th Cir. 1955), a release of antitrust violations has an impact, not solely on the parties, but upon the public as well.

At the very least, such testimony as is present in this case should require a determination by the trier of fact as to the intention of the parties. As noted above, had principles of federal law concerning the intention of the parties to a release been applied to the facts of this case, a contrary result would have been reached in the court below.

In its delineation of the public policy which recognizes the right of individuals to settle and release antitrust violations, the *Three Rivers* court stated: "[P]ublic interest does not prevent the injured party from releasing his claim *and foregoing the burden of litigation*." (522 F.2d 885, 892. Emphasis added.) In relying on *Three Rivers*, the court below failed to note the absence of such policy considerations in the present case. Where, as here, a party executes a general release, with no possible intention of releasing antitrust violations, and later chooses to assume the burden of private enforcement of the federal antitrust laws, public policy should encourage and facilitate such efforts. This principle of public policy was espoused by the Fifth Circuit Court of Appeals in *Redel's*:

> There are two policies which must be accommodated. The first requires the greatest respect for private enforcement as the hallmark of the federal antitrust regulatory system. The second policy requires us to respect the amicable settlement and release of antitrust claims by the parties themselves. *Where these policies are brought into conflict, the first must prevail.* 498 F.2d 95, 100 (emphasis added)

The court below, though paying lip service to the tenets of public policy, failed to consider and implement the larger principles which are the basis of that policy.

C. A RELEASE OF CLAIMS FOR TREBLE DAMAGES UNDER THE ANTITRUST LAWS IS INVALID WHERE THE ILLEGAL ACTIVITY CONTINUES PAST THE DATE OF THE RELEASE.

Petitioner concedes that there is no public policy against a voluntary and intelligent release of past antitrust violations where such release does not contravene legislative policy. It asserts, however, that federal policy mandates a contemporaneous cessation of the conduct which violates the antitrust laws. It is also well settled that a release of prospective antitrust violations is against public policy, and may *itself* constitute a restraint of trade. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 704 (1944); *Midstate Horticultural Co. v. Pennsylvania R. Co.*, 320 U.S. 356, 361 (1943); *Redel's Inc. v. General Electric Company*, 498 F.2d 95, 99 (5th Cir. 1974); *Fox Midwest Theatres v. Means*, 221 F.2d 173, 180 (8th Cir. 1955).

Here, petitioner was unaware of and did not intend to release either retrospective or prospective antitrust claims; and here the illegal activities were unaffected and uninterrupted by the general release. To hold the release valid under such circumstances would constitute a flouting of federal law. Public policy must not tolerate such abuse of the law. Even had the releasor intended to release its claim for damages for past antitrust violations and received consideration therefor, where antitrust violations continue, the consideration for the release is tantamount to bribery.

General Foods was aware at the time the release was obtained that Famous Foods possessed a potential antitrust claim against it. Further, General Foods had been sued in September, 1971, by a former distributor whose successful complaint challenged the identical MFSA system. It cannot be denied that General Foods benefited by obtaining a release of potential antitrust claims while continuing its pricing practices unthreatened by private litigation. Nor can it be denied that such actions are adverse to, and a frustration of, the legislative scheme of the federal antitrust laws.

"Where a private right is granted in the public interest to effectuate legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate." *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 704 (1944).

Petitioner submits that a release of antitrust claims, whether or not given knowingly or intentionally, is ineffectual to bar a treble damage action where the antitrust violations continue uninterrupted past the date of such release.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

FAMOUS FOODS, INC.,

Plaintiff,

Civil Action
No. 74-481

vs.

GENERAL FOODS CORPORATION,

Defendant.

_____/

O P I N I O N

This Sherman Antitrust proceeding arises under Title 15, United States Code, §§ 1 and 15, and claims resale price maintenance on the part of the defendant in the distribution and sale of the defendant's, General Foods Corporation, institutional coffee and food products. The immediate matter before the Court is a Motion for Summary Judgment filed by the defendant.

The Court has afforded the parties a most extensive and complete hearing in this matter and has considered the briefs and arguments of counsel.[1] After a full and

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[1]At the hearing on November 7, 1974, the Court was apprised by counsel that a matter of a similar nature was pending before the United States Court of Appeals for the Third Circuit at No. 72-1710 (Three Rivers Motors Company v. The Ford Motor Company and Auto-Lite Corporation,

exhaustive review of the record together with the release executed in this proceeding the Court must conclude that the Motion for Summary Judgment be granted.

It was stipulated and agreed by the parties that if a Motion for Summary Judgment is granted it must be limited to the period of time between June 3, 1958 and September 7, 1972, for the reason that business relations continued for about eight months as to other products between the parties subsequent to the signing of the general release of September 7, 1972.

Distribution of the products of the defendant was made by the plaintiff for a period in excess of fourteen years. The parties operated under a written agreement from June 3, 1958 until September 7, 1972 on which date the plaintiff sold its coffee distribution business to the defendant. At the time of said sale, a general release was executed by the parties in which each mutually released the other from any and all claims and demands of any nature whatsoever which either party ever had, now has, or may hereafter have. For all practical intents and purposes this general release is the same type which the United States Court of Appeals for the

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3rd Cir., 1975). This Court deferred ruling on the motion pending the decision by the Appeals Court which was filed on July 1, 1975. A second hearing was held on August 7, 1975 whereby counsel were again afforded every opportunity to present any and all additional arguments relative to the Motion for Summary Judgment.

Third Circuit held as being valid in the Three Rivers Case, (3rd Cir., 1975). No useful purpose could be gained in making detailed reference to the marked similarities of the two releases and the discussions are most thoroughly and completely expressed by the United States Court of Appeals in that case. Suffice to say, I am satisfied that the releases are of an exact similar nature and under all the facts which are not disputed, the cause of action of the plaintiff in this proceeding, for the period of time prior to September 7, 1972, is barred by said release. The complete terms and provisions of said release provides in detail as follows:

"AGREEMENT between FAMOUS FOODS INC., a Pennsylvania corporation, having a principal place of business at 5th and Pennsylvania Railroad, Sharpsburg, Pittsburgh, Pennsylvania (hereinafter called FAMOUS) and GENERAL FOODS CORPORATION, a Delaware corporation having its principal place of business at 250 North Street, White Plains, New York 10625 (hereinafter called GENERAL FOODS)

WITNESSETH:

WHEREAS, FAMOUS has been a distributor of certain institutional products of GENERAL FOODS in the Counties of Allegheny, Westmoreland, Armstrong and Butler, in the Commonwealth of Pennsylvania, and

WHEREAS, GENERAL FOODS has purchased from FAMOUS certain of the assets used by FAMOUS in such institutional distribution;

NOW THEREFORE, it is hereby mutually agreed by the parties hereto as follows:

Any distributorship agreement express or implied between GENERAL FOODS and FAMOUS relating to or arising from FAMOUS distributing certain institutional coffee products of GENERAL FOODS, including but not limited to that agreement between the parties dated June 3, 1958, shall be null, void and of no effect from the closing for the purchase of assets referred to above, and the parties hereto mutually release each other from any and all claims, liabilities, or other obligations either party ever had, now has or may hereafter have against or to the other, except:

(1) Indebtedness of FAMOUS to GENERAL FOODS for merchandise heretofore sold and delivered from GENERAL FOODS to and not heretofore paid for;

(2) Any and/or all loans and advances from GENERAL FOODS to FAMOUS not heretofore paid; and

(3) That indebtedness pro-

vided for in the documents exchanged at the closing of the sale of the assets of FAMOUS to GENERAL FOODS, as above.

IN WITNESS WHEREOF, the parties hereto have executed this agreement this 7th day of September, 1972."

Rule 54(b) of the Federal Rules of Civil Procedure permits the District Court in its discretion to determine appropriate time when each final decision upon one or more but less than all the claims in a multiple claims action is ready for appeal. Allis-Chalmers Corporation v. Philadelphia Electric Company v. Allis-Chalmers Corporation v. Westinghouse Electric Corporation, (3rd Cir., 1975). It is clear that Rule 54(b) of the Federal Rules of Civil Procedure requires a trial judge to exercise considered discretion, weighing the overall policy against piecemeal appeals against whatever exigencies the case at hand might have.

The Court is convinced that it is in the interest of sound judicial administration and public policy that its decision to grant summary judgment on the question of validity of the release be certified for appeal. Many factors were considered by the Court including those set forth in Allis-Chalmers Corporation, (3rd Cir., 1975).

One such factor which would weigh heavily against the granting of 54(b) certification is the presence of a

counterclaim which could result in a set off against any amount due and owing to plaintiff. That element is not present in the instant case. Another factor which would weigh against the granting of 54(b) certification would be that the possibility of the need for review might be made by future developments in the District Court. The likelihood of that happening here is very remote. Any decision by the District Court on plaintiff's claim, from the period of September 7, 1972 to June 15, 1973, can in no way effect the Appellate Court's decision as to the validity of the release as to a bar as to any and all claims prior to September 7, 1972. There is no dispute that plaintiff's cause of action, for the period June 3, 1958 to September 7, 1972, involved different merchandise than plaintiff's cause of action from September 7, 1972 to June 15, 1973. In addition, the pre September 7, 1972 action is dependent on the validity of the general release signed by the parties.

If the general release is held to be a bar to any cause of action plaintiff might have prior to September 7, 1972, much judicial time and expense as well as time and expense of the litigants can be saved. It is self-evident how much more simple and less time consuming the trial would be by confining it solely to the question as to whether or not violation of the Sherman Antitrust Act does or does not exist for the subsequent business relations between the parties during the eight month period after the signing of the release. In the event that the Appeals Court should determine the general release

to be invalid and therefore not a bar to plaintiff's cause of action prior to September 7, 1972, all counsel need do, since discovery has concluded, is to conclude their pretrial schedule for the period between 1958 and 1972 and the action will proceed most expeditiously to trial.

Plaintiff's counsel suggested that a full and complete trial on both claims be held with interrogatories submitted to the jury covering the respective periods of plaintiff's claim. Counsel further indicated that depending on the Court of Appeal's decision as to the validity of the release, the District Court would then have the authority to enter a judgment notwithstanding the verdict if justice demands. I am of the opinion that to follow this suggestion would be a grossly exhorbitant and unjustified waste of time and expenditure and substantial monies for the cost of jurors and the underlying court personnel. To follow plaintiff's counsel's suggestion could result in a substantial prejudice and bias to the defendant in the jury findings as to the defendant's actions regarding the sale of other merchandise since the date of the release if the Court of Appeals affirms this Court's decision in granting summary judgment.

In view of the foregoing it is clear that sound judicial administration requires the instant judgment be certified for appeal.

I am well aware that absence of certification for appeal, the granting of

the Motion for Summary Judgment based on the release, does not finally dispose of the whole cause of action. I am of the firm opinion that the order entered involved a controlling question of law as to which there is substantial ground for difference of opinion; but, unquestionably, an immediate appeal from said order will materially advance the ultimate determination of the litigation. Many prejudices and unjust inferences could well be drawn against the defendant if in the trial of the proceeding testimony was permitted between 1958 and 1972 which could have no material or subsequent value on the determination of the issues by the trial judge and jury and the period from September 7, 1972 to June 15, 1973 when the business relations between the parties terminated.

Findings of fact and conclusion of law have not been separately stated but are included in the body of the foregoing opinion as specifically authorized by Rule 52(a) of the Federal Rules of Civil Procedure.

An appropriate Order is entered.

O R D E R

AND NOW, this 26th day of August, 1975, judgment is entered in favor of the defendant, General Foods Corporation, and against the plaintiff, Famous Foods, Inc., for all claims and demands of any nature whatsoever prior to September 7, 1972 the date of the general release.

Consistent with the provisions of

28 U.S.C.A., §1291, counsel for the plaintiff in its discretion may make application for leave to appeal from the granting of summary judgment to the United States Court of Appeals for the Third Circuit within ten (10) days after the entry of this order which is granting the Motion for Summary Judgment in favor of the defendant. If this procedure is followed by the plaintiff, all proceedings prior to September 7, 1972 shall be stayed in the District Court.

/s/ Wallace S. Gourley
Senior District Judge

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-2268

FAMOUS FOODS, INC., Appellant

v.

GENERAL FOODS CORPORATION

Appeal from the United States District Court for the
Western District of Pennsylvania
(C. A. No. 74-481)

Argued May 24, 1976

Before: SEITZ, Chief Judge, ADAMS and HUNTER, Circuit Judges.

JUDGMENT ORDER

After consideration of all contentions raised by appellant, see Three Rivers Motors Co. v. Ford Motor Co., 522 F.2d 885 (3d Cir. 1975), it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxes against appellant.

BY THE COURT,

/s/
Circuit Judge

ATTEST:

/s/
Thomas F. Quinn
Clerk

DATED: Jun 1 1976

THREE RIVERS MOTORS COMPANY
v.
The FORD MOTOR COMPANY and
Auto Lite Corporation, Appellants.

No. 74-1710.

United States Court of Appeals,
Third Circuit.

(522 F.2d 885 (1975))
Decided July 1, 1975.

OPINION OF THE COURT

FORMAN, Circuit Judge.

This is an interlocutory appeal[1]* from the refusal of the United States District Court for the Western District of Pennsylvania to apply a general release to bar a pending antitrust action by Three Rivers Motor Company (Three Rivers) against Ford Motor Company (Ford). The release, executed in favor of Ford by Three Rivers upon termination of its Ford franchise, was raised by Ford in the context of a Rule 12(b)(6), Fed.R. Civ.P., motion to dismiss the antitrust claim.[2] For the reasons set forth herein, it is held that the release bars Three Rivers' antitrust cause of action against Ford and, therefore, the District Court's ruling will be reversed and remanded with directions to grant Ford's motion to dismiss.

From 1951 to 1970 Three Rivers, first a Delaware and later a Pennsylvania

* Footnotes follow the text of the Opinion.

corporation, operated under a Ford franchise in the Pittsburgh, Pennsylvania area with William Winterhalter serving as its president. Ford owned and operated a competing dealership in the same area under the name of Triangle Motors during at least part of this twenty-year span.[3] Three Rivers was aware of the Ford-owned dealership and also knew that the resulting competition was a factor contributing to Three Rivers' post-1965 operating losses. Prompted by these operating losses, Mr. Winterhalter began negotiating with Ford in 1966 in an effort to resign the Three Rivers franchise without sacrificing the corporation's investment in parts, accessories and equipment which at the time amounted to more than $120,000. Under the pre-1967 standard franchise agreement which Mr. Winterhalter and other Ford dealers had within the manufacturer, Ford had the option but not the obligation to repurchase Three Rivers' vehicles, parts inventory, etc. This repurchase of inventory stumbling block was apparently resolved in June 1967 when Ford unilaterally changed its franchise agreement to obligate Ford to buy back the inventory in return for the dealer's execution of a general release in a form specified by Ford. It is this general release which Ford now raises as a defense against the antitrust suit brought by Three Rivers.

Further problems, unrelated to the sale of inventory, delayed resignation of the Three Rivers franchise for several years. Finally, in early 1970 an agreement was reached and a closing was held where Three Rivers was to execute the

general release and transfer its franchise and inventory to East Hills Ford, a new privately-owned dealership, in return for a total consideration of $524,000, part of which was supplied by Ford and part by East Hills. At the closing, Mr. Winterhalter balked at executing the general release, but after some negotiating between the parties' attorneys, he signed the release form, modified in a single respect--an exception was added to the release for a pending product liability suit filed by Eazor Trucking against Three Rivers and Ford.[4]

Three years later, in February 1973, Three Rivers filed the instant suit charging Ford with various antitrust violations arising, *inter alia*, from an alleged price-fixing arrangement which encouraged certain fleet customers to purchase their new vehicles from the Ford-owned dealership, Triangle Motors. The limited question presented by this appeal is whether the release signed by Three Rivers is written in language broad enough to encompass antitrust claims and, therefore, bars this action against Ford.

Is the release to be interpreted by federal law or by state law?

While the antitrust cause of action is created by federal law, it does not necessarily follow that all issues in an antitrust case are to be determined by reference to federal law. *Dura Electric Lamp Co. v. Westinghouse Electric Corp.*, 249 F.2d 5, 6 (3d Cir. 1957); Cf. *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 67-72, 86 S.Ct. 1301, 16 L.Ed.2d 369

1966; *United States v. Yazell*, 382 U.S. 341, 348-58, 86 S.Ct. 500, 15 L.Ed.2d 404 (1966). As explained in Hart and Wechsler, The Federal Courts and the Federal System (2d Ed. 1973):

> "Federal law is generally interstitial in its nature. It rarely occupies a legal field completely, totally excluding all participation by the legal systems of the states. This was plainly true in the beginning when the federal legislative product (including the Constitution) was extremely small. It is significantly true today, despite the volume of Congressional enactments, and even within areas where Congress has been very active. Federal legislation, on the whole, has been conceived and drafted on an *ad hoc* basis to accomplish limited objectives. It builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose. Congress acts, in short, against the background of the total *corpus juris* of the states in much the way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation." Hart and Wechsler, The Federal Courts and the Federal System 470-71 (2d Ed. 1973).

Although Congress has explicitly occupied the antitrust field to the extent of legislating duties and causes of action for their enforcement, it has provided no rule for interpreting releases of anti-

trust claims. Thus, the question before this panel is whether federal common law or state law should be used to interpret the contract by which Three Rivers allegedly released its private antitrust cause of action.

[1] Initially, it bears noting that the principles enunciated in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and related decisions do not *compel* the application of state contract law in the instant case.[5] Although *Erie* does require that state law be applied in certain areas where law-making competence has been exclusively allocated to the states,[6] its mandate has no application to the resolution of questions affecting the federal antitrust statute. Since this case deals with the operation of a Congressional statutory scheme, the federal courts are *competent* to interpret the release without regard to state law. Cf. *United States v. Standard Oil Co.*, 332 U.S. 301, 307, 67 S.Ct. 1604, 91 L.Ed. 2067 (1947); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 245, 63 S.Ct. 246, 87 L.Ed. 239 (1942).[7]

[2,3] Having demonstrated that this court has the power to apply federal common law to interpret the release, it must be noted that we are also free to apply a state rule of law. *Reconstruction Finance Corp. v. Beaver County*, 328 U.S. 204, 209-210, 66 S.Ct. 992, 90 L.Ed. 1172 (1946); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367, 63 S.Ct. 573, 87 L.Ed. 838 (1943). Since Congress has not enacted a federal law

for interpreting antitrust releases nor has it indicated an intent to adopt state laws on the subject, this court must consider for itself whether the statutory policies embodied in the antitrust laws will be better promoted by the absorption of state laws regarding release or the formulation of a federal rule. Factors relevant to the balancing of these competing governmental interests include: the need for a uniform federal rule,[8] the extent to which the transaction in question fits within the normal course of activities regularly governed by state law,[9] and the possibility of the state rule frustrating the operation of the federal statutory scheme.[10]

The need for uniformity arises when the various state laws, by their diversity, threaten to impede the efficient operation of the federal statute. As a practical matter, however, a judicially-created uniform rule may be difficult to attain. It has been observed that:

> "[T]he fact is--presumably well known to the legal profession--that such complete uniformity may be most unlikely as a matter of common law development: the only court in a position to assure that degree of uniformity--the United States Supreme Court--is so burdened with its present work that it is highly improbable that it could undertake effectively to develop detailed substantive rules for any area we are here considering." Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State*

Rules for Decision, 105 U.Pa.L.Rev. 797, 813 (1957).[11]

Nevertheless, several cases have found the need for uniformity sufficient to require implementation of a federal common law rule. In *Clearfield Trust Co. v. United States*, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943), the Supreme Court held that the diversity of state commercial laws necessitated the development of federal common laws to govern commercial paper issued by the United States. A WPA pay check issued by the United States at Harrisburg, Pennsylvania was stolen and cashed by way of forged endorsement. Clearfield Trust Company, a Pennsylvania bank, presented the check for payment to the Federal Reserve Bank in Philadelphia and collected the face amount. More than eight months later the United States notified Clearfield Trust that the endorsement was a forgery and instituted suit for reimbursement. Under Pennsylvania law, where all the relevant transactions took place, the delay in notifying the bank of the forgery would have prevented the United States from recovering the funds. The Court, however, declined to apply the state rule reasoning:

> "The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the conflict of law rules of the forum, would subject the rights and duties of the United States to exceptional

> uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain." 318 U.S. at 367, 63 S.Ct. at 575.

In contrast, when two private parties bargain for a release, they are little affected by the diversity of state laws controlling the interpretation of releases. Even though the private antitrust cause of action is likely to involve multi-state and multi-party litigation, a release of that cause is nothing more than a contract negotiated between two or more of the private parties. Irrespective of the variation among state laws interpreting releases, the contracting parties can readily couch their release agreement in terms compatible with whichever state's law is applicable. Thus, a nationally uniform interpretation rule would have little utility. Its only effect would be to encourage the contracting parties to phrase their release in terms compatible with the national rule rather than with the law of a particular state.

The instant case is distinguishable from *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971), where the Supreme Court adopted a uniform national rule to govern the effect of a release on co-defendants in other states. Several companies were alleged to have jointly violated the antitrust laws resulting in injury to the Zenith Radio Corporation. One issue presented was whether Zenith's

valid release of one of the conspirators operated to release the remaining conspirators. The Court noted a wide variety of state laws on the subject and decided that a uniform rule was needed to permit a plaintiff injured by an antitrust violation to settle its claim against defendants in one state without unintentionally releasing its claim against co-defendants in other states.[12] 401 U.S. at 346-47, 91 S.Ct. 795. Similar multi-state complications do not arise in interpreting the terms of the release.[13]

The application of state law to the interpretation of a contract will not come as a surprise to the contracting parties. State law customarily governs the field of contracts and it is to state rather than federal law that private parties are likely to refer when formulating the terms of a contractual release. See *Novak v. General Electric Corp.*, 282 F.Supp. 1010, 1016 (E.D.Pa.1967).[14] The instant release was signed in connection with the sale of a business and purported to broadly release "all . . . causes of action." The parties might be quite surprised indeed to learn that their language will be interpreted by state law in tort, product liability and other cases, but by federal common law in antitrust cases. Absent a substantial reason for doing so, the law of private contracts should not be burdened with the complication of a separate federal rule for releasing an antitrust cause of action. Thus, the Supreme Court has stated:

> "Both theory and the precedents of this Court teach us solicitude for

> state interests . . .. They should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied." *United States v. Yazell*, 382 U.S. 341, 352, 86 S.Ct. 500, 507, 15 L.Ed.2d 404 (1966).

[4] Applying state law to interpret private antitrust causes of action will not frustrate the federal enforcement of antitrust violations. The private antitrust cause of action provided by 15 U.S.C.A. § 15 allows a person injured as the result of an antitrust violation to bring a private suit for treble damages against the violator. Congress enacted this private cause of action as a supplemental means for the enforcement of the antitrust laws, paralleling the public cause of action enforceable by the Government. *Byram Concretanks, Inc. v. Warren Concrete Products Co.*, 374 F.2d 649, 651 (3d Cir. 1967). Although there is an unquestioned public interest in the "vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action," *Lawlor v. National Screen Service*, 349 U.S. 322, 329, 75 S.Ct. 865, 869, 99 L.Ed. 1122 (1955), this public interest does not prevent the injured party from releasing his claim and foregoing the burden of litigation. E. g. *Fabert Motors, Inc. v. Ford Motor Co.*, 355 F.2d 888, 890 (7th Cir.), *cert. denied*, 384 U.S. 939, 86 S.Ct. 1462, 16 L.Ed.2d 539 (1966); *Duffy Theatres, Inc. v. Griffith Consol.*

Theatres, Inc., 208 F.2d 316, 324 (10th Cir. 1953), *cert. denied*, 347 U.S. 935, 74 S.Ct. 629, 98 L.Ed. 1085 (1954). Since release of the private cause of action in no way dilutes the government's remedies against the antitrust violator, federal policy would not seem to require the condemnation of releases which are otherwise valid under the various state laws. Cf. *Main Line Theatres, Inc. v. Paramount Film Distributing Corp.*, 189 F.Supp. 314 (E.D.Pa. 1960) (Van Dusen, J.) *aff'd*, 298 F.2d 801 (3d Cir. 1962), *cert. denied*, 370 U.S. 939, 82 S.Ct. 1585, 8 L.Ed.2d 807 (1962).

[5,6] The applicable Pennsylvania law is not incongruous with federal antitrust objectives.[15] In Pennsylvania, the general rule for construction of releases is that the intention of the parties must govern, but this intention must be gathered from the language of the release. *Evans v. Marks*, 421 Pa. 146, 218 A.2d 802 (1966). A signed release is binding upon the parties unless executed and procured by fraud, duress, accident or mutual mistake. *Kent v. Fair*, 392 Pa. 272, 140 A.2d 445 (1958). This approach guards against the antitrust violator's use of deception to avoid the federally-created cause of action, while at the same time it provides an adequate means to accomplish the private objectives of the parties.

[7,8] We conclude that Pennsylvania law should govern the construction of the release in the present controversy.[16] A federal court would still be permitted, however, to reject the rule of a particular state whose doctrine on the interpre-

tation of releases is not entirely consistent with federal antitrust objectives. As Justice Jackson noted in an often-quoted concurring opinion:

> "A federal court sitting in a non-diversity case such as this does not sit as a local tribunal. In some cases it may see fit for special reasons to give the law of a particular state highly persuasive or even controlling effect, but in the last analysis its decision turns upon the law of the United States, not that of any state. Federal law is no juridical chameleon, changing complexion to match that of each state wherein lawsuits happen to be commenced because of the accidents of service of process and of the application of the venue statutes. If is found in the federal Constitution, statutes, or common law. Federal common law implements the federal Constitution and statutes, and is conditioned by them. Within these limits, federal courts are free to apply the traditional common-law technique of decision and to draw upon all the sources of the common law in cases such as the present. *Board of Commissioners v. United States*, 308 U.S. 343, 350, 60 S.Ct. 285, 288, 84 L.Ed. 313."
> *D'Oench, Duhme & Co. v. F.D.I.C.*, 315 U.S. 447, 471-72, 62 S.Ct. 676, 686, 86 L.Ed. 956 (Jackson, J., concurring) (footnote omitted).

See also *Dice v. Akron, C. & Y.R. Co.*, 342 U.S. 359, 362, 72 S.Ct. 312, 314, 96 L.Ed. 398 (1952) (Ohio's strict standards for

proving that a release was fraudulently obtained rejected as "wholly incongruous with the general policy of the [Federal Employers' Liability] Act").

Construing the Release

Turning now to the construction and validity of the release, two issues were presented to the District Court by Three Rivers. First, in its Petition to Set Aside a Release, Three Rivers asserted that it signed the release under duress. As alleged, the duress consisted of Ford's refusal to repurchase Three Rivers' inventory of parts, accessories, and equipment unless the release was signed, coupled with the fact that there was no other available market where the items could be sold. Ford answered in a Motion to Dismiss the Petition, claiming that Three Rivers failed to set forth a sufficient basis to avoid or set aside the release. Specifically, Ford argued that "[u]nder applicable principles of law, the character of duress which is required to be shown in order to raise a question that a General Release was executed under duress must be of such a kind and character as to overcome the free volition of the party executing the release." In addition to answering Three Rivers' allegations of duress, Ford also requested the court to enter judgment in its favor pursuant to Rule 12, Fed.R.Civ.P., on the ground that the release is a complete bar to the antitrust cause of action.

[9,10] The District Court confined its decision to the construction of the release, never ruling on Three Rivers'

allegation that the release was executed under duress. Assuming for the moment that the facts offered to demonstrate duress are as alleged by Three Rivers, they fail as a matter of law to constitute grounds for setting aside the release. At most, the facts indicate that economic conditions of the marketplace induced Three Rivers to sign the release, but there is no allegation that Ford applied any illegal pressure. Duress is not established merely by showing that the release was given under pressure of the financial circumstances disclosed here. Cf. *Colonial Trust Co. v. Hoffstot*, 219 Pa. 497, 504, 69 A. 52 (1908); accord, *Fabert Motors, Inc. v. Ford Motor Co.*, 355 F.2d 888, 890-91 (7th Cir. 1966); *The Adonis*, 38 F.2d 743, 744 (3d Cir. 1930). Moreover, under Pennsylvania law where the contracting party is free to come and go and to consult with counsel, there can be no duress in the absence of threats of actual bodily harm. *Carrier v. Wm. Penn Broadcasting Co.*, 426 Pa. 427, 430-31, 233 A.2d 519 (1967).[17] Thus, there can be no serious contention that Three Rivers was unlawfully coerced into signing the release in the instant case, since both parties were and are represented by competent counsel. Counsel for Three Rivers was an active participant in the negotiations and, in fact, extracted a substantial concession from Ford prior to the signing of the release. As originally proposed, the release contained no exception for third-party actions which Three Rivers might have against Ford based on "warranty, products, and parts liability." This exception was drafted only after Three Rivers' counsel conferred with Mr.

Winterhalter and then requested that such an exception be made in order to preserve Ford's potential liability in the then-pending suit of Eazor Trucking Company against Three Rivers and Ford.

The second issue presented to the District Court by Three Rivers, and the only one on which the court ruled, was whether the parties intended to release accrued, but unknown, antitrust claims. Initially, the District Court examined the language of the release and found it to be ambiguous on its face as to whether it was intended to include anything more than matters relating to the sale of Three Rivers' assets.[18] Although the court conceded the operative language to be very broad, releasing "any and all manner of action and actions," it concluded that an ambiguity arose from the parties' failure to include a "whereas" clause expressly stating their intention to settle all differences.[19] Since ambiguous language in a contract justifies resort to extrinsic evidence of intent,[20] the District Court went on to find that prior to signing the release the parties did not discuss the possibility of any antitrust violation[21] and that Three Rivers' President, Mr. Winterhalter, was unaware that Ford had given preferential treatment to its competitive factory-owned store.[22] From these extrinsic facts the court concluded that the parties did not intend the release to bar antitrust actions.[23]

[11] We accept, as we must absent plain error, the District Court's factual conclusion that Mr. Winterhalter did not have in mind the specific possibility of

an antitrust action when he signed the General Release. This alleged lack of knowledge is not sufficient, however, to modify clear and unambiguous terms of a written contract.[24] *Robert F. Felte, Inc. v. White*, 451 Pa. 137, 143-44, 302 A.2d 347 (1973); *Caplan v. Saltzman*, 407 Pa. 250, 254-55, 180 A.2d 240 (1962). The scope of our review, therefore, is limited to determining whether the District Court erred as a matter of law by holding the release to be ambiguous on its face.

Described at the outset as a "General Release," the agreement may be broken down for convenient analysis into three distinct parts: a recitation of the considerations passing between the parties, a statement of the types of actions being released, and an exception to the release. The description of consideration provides:

> "Three Rivers Motors Company . . . (hereinafter called 'the Dealer'), by W. A. Winterhalter, its President (hereinafter called 'the Principal') being the owner of the Dealer, for and in consideration of the sum of One Dollar paid to the Dealer by Ford Motor Company . . . and in consideration of Ford's providing substantial Dealer Development Funds to East Hills Ford, Inc. in order to purchase certain property of the Dealer, hereby jointly and severally, for itself, himself or herself, and their respective heirs, representatives, successors and assigns, releases, remises and forever discharges Ford and its successors and assigns . . .."

Nothing in this language can be used to infer whether or not the parties intended a general settlement of all their accounts and liabilities. This clause is nothing more than a simple and orderly listing of the considerations given by Ford (i.e. one dollar plus its agreement to provide development funds) followed by the consideration given by Three Rivers (i.e. the release). The phrase "in order to purchase certain property of the Dealer" is included only to show that Ford's providing funds to East Hills Ford, Inc. conferred some benefit upon the "Dealer," Three Rivers, and, contrary to the District Court's implications,[25] does not indicate an intent to limit the release to matters concerning the sale and disposition of Three Rivers' assets. Moreover, even if it were assumed that the quoted phrase had some bearing on the scope of the release, an equally strong inference could be drawn that the sale was a total severance of the Ford-Three Rivers business relationship and the release, therefore, was intended as a final settlement.

[12,13] The operative section of the release, describing the types of actions being released, is very broad:

> ". . . of and from all and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever

> in law, in admiralty or in equity, which against Ford, the Dealer or the Principal, or their respective heirs, representatives, successors or assigns, ever had, now have or which they or any of them hereafter can, shall or may have, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the date of these presents . . . ."

This language is as comprehensive as language can be. The general words "all and all manner of action and actions . . . whatsoever in law, in admiralty or in equity . . . [which Three Rivers or Winterhalter] . . . ever had, now have or which they . . . hereafter can, shall or may have" indicates a clear intent to leave nothing open and unsettled between the parties. There is not the merest suggestion of a reservation of rights. Although the District Court was correct in noting that the phrase "known and unknown claims" does not appear, the phrase "ever had, now have or which they . . . hereafter can, shall or may have" amounts to the same thing. Under the laws of Pennsylvania, this language will be construed as a general settlement of accounts and liabilities. In a case construing analogous language, the Pennsylvania Supreme Court explained:

> "It is true that ordinarily the words of a release should not be construed to extend beyond the express consideration mentioned so as to make a release for the parties which they never intended or contemplated. Thus, general words of a release will not

> usually be construed to bar a claim which had not accrued at the date of the execution of the release (*Rapp v. Rapp*, 6 Pa. 45), nor a claim, the existence of which was not known to the party giving the release (*Cockroft v. Metropolitan Life Insurance Co.*, 125 Pa.Super. 293, 189 A. 687). But, the rule is merely one of construction, and is never applicable to bar a claim where the very language used by the parties excludes its use for that purpose. *Flaccus v. Wood*, 260 Pa. 161, 167, 103 A. 549.
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> "The release is very broad in its terms. It releases Brill, as also his heirs, executors, and administrators, not only 'of and from the said recited bond or obligation and of and from . . . the payment of any sum or sums of money therein named, and of and from the payment of any other sum or sums of money whatsoever for my past or future support and maintenance,' but also releases Brill, his heirs, executors and administrators *'of and from all manner of actions and causes of action, suits, debts, dues, accounts, bonds, covenants, contracts, agreements, judgments, claims and demands whatsoever in law or equity, which against the said J. Edward Brill I ever had . . .'*.
>
> "The language of this release [indicates] that the parties had in mind a general settlement of all accounts up to that time . . .." *Brill's Estate*, 337 Pa. 525, 527-28, 12 A.2d 50, 52 (1940) (emphasis added to the

language paralleling the release in the instant case).[26]

Thus, Pennsylvania law is clearly that where the parties manifest an intent to settle all accounts, the release will be given full effect even as to unknown claims.[27]

The final section of the release lists the specific exceptions negotiated by the parties' attorneys immediately prior to the signing:

> ". . . excepting herefrom, however, only such liability, if any, as Ford may have to the Dealer for warranty, products, and parts liability for which claims and/or suits are made/ filed against Three Rivers Motors Co., with regard to sales and/or services performed by Three Rivers Motors Co., on or before the date of the closing held on this date. It is understood that only one claim is now outstanding, namely, that of *Eazor Trucking Company v. Three Rivers Motors Co.*, and The Ford Motor Company, No. 1347 January Term, 1970, in the Court of Common Pleas of Allegheny County, Pennsylvania."

[14] Scrutiny of this language further supports the view that the parties intended a complete settlement of accounts, rather than a release of only those claims arising out of the disposition of Three Rivers' inventory. The disposition of Three Rivers' inventory must be placed in proper perspective. The same parts, accessories and equipment

repurchased by Ford originally had been sold by Ford to Three Rivers for retail to Three Rivers' customers. Ford's potential liability to Three Rivers, viewed solely as to claims arising from this sale and repurchase of inventory, was limited. Claims were not likely to be pressed against Ford for any materials, whether defective or not, which Ford repurchased from Three Rivers. When the release was signed, the most realistic threat of liability against Ford was the possibility of being sued by Three Rivers on a third-party claim arising from defective parts sold to Three Rivers' customers. Yet, the single category of claims expressly excluded from the release was third-party actions based on "warranty, products, and parts liability." Unless the comprehensive language releasing all types of claims is to be read as much ado about nothing, the release must cover more than those claims arising from Ford's repurchase of Three Rivers' inventory. The only reasonable conclusion is that the release was intended as a general settlement of accounts.

The District Court's decision that the "General Release" executed by Three Rivers Motors Company does not bar the antitrust cause of action will be reversed and the case remanded to the District Court with directions to grant Ford's motion to dismiss the antitrust action.

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[1] Ford's petition for leave to appeal pursuant to 28 U.S.C.A. § 1292(b) was granted by another panel of this court. C.A.

Misc. Record No. 74-8136.

[2]The District Court's decision denying Ford's motion to dismiss the antitrust action and granting Three Rivers' petition to set aside the release is reported at 374 F.Supp. 620 (W.D. Pa. 1974).

[3]Ford's ownership of Triangle Motors was also the subject of an antitrust suit filed by 22 Ford Inc., another privately-owned dealership in the Pittsburgh area. See *Rea v. Ford Motor Co.*, 355 F.Supp. 842 (W.D.Pa. 1973), *rev'd and remanded*, 497 F.2d 577 (3d Cir. 1974), *cert. denied*, 419 U.S. 868, 95 S.Ct. 126, 42 L.Ed.2d 106 (1974).

[4]The release is set out in full in *Three Rivers Motors Company v. Ford Motor Company*, 374 F.Supp. 620, 621 n.1 (W.D. Pa. 1974).

[5]In its complaint Three Rivers alleged both diversity of citizenship and the existence of a federal question as grounds for federal jurisdiction. But even if only the federal question ground had been asserted, *Erie* would still have potential application. Applicability of the *Erie* doctrine is not dependent on the jurisdictional basis, even though it has most often been applied in cases where federal jurisdiction is based on diversity of citizenship. E. g. *Maternally Yours v. Your Maternity Shop*, 234 F.2d 538, 540-41 n.1 (2d Cir. 1956). See generally Hart and Wechsler, The Federal Courts and the Federal System 766-68 (2d Ed. 1973).

[6]Whether this aspect of *Erie* derives from the Constitution or from federal statutes was a matter of dispute within the *Erie* Court itself, *compare* 304 U.S. at 79-80, 58 S.Ct. 817 (opinion of the Court) *with* 304 U.S. at 88, 58 S.Ct. 817 (Butler, J., concurring), and remains a subject of continuing debate. See Wright, Federal Courts § 56 and authorities cited in nn. 15, 16 (2d Ed. 1970).

[7]See also, Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U.Pa.L.Rev. 797, 798-801 (1957).

> "Such competence is essential to the effective implementation of the legislative powers committed to the national government by the Constitution. To be sure, within the central structure, those powers are granted to the Congress, and, for various good reasons such grants cannot be taken directly to authorize judicial law-making of equal scope. At the same time, the separation of powers cannot be watertight; exclusive reliance upon statutory provision for the solution of all problems is futile. Beyond the political realities which will at times compel congressional bypassing of any issue--thus leaving it open until pending litigation forces court resolution--lie such simpler pressures as shortness of time and, perhaps most important, the severe limits of human foresight. Together, these factors combine to make the concept of statutory enactment as a totally self-

sufficient and exclusive legislative process entirely unreal. At the very least, effective Constitutionalism requires recognition of power in the federal courts to declare, as a matter of common law or 'judicial legislation,' rules which may be necessary to fill in interstitially or otherwise effectuate the statutory patterns, enacted in the large by Congress. In other words, it must mean recognition of federal judicial competence to declare the governing law in an area comprising issues substantially related to an established program of government operation." *Id.* at 799-800 (footnotes omitted).

[8] *U.A.W. v. Hoosier Cardinal Corp.*, 383 U.S. 696, 701-03, 86 S.Ct. 1107, 16 L.Ed.2d 192 (1966); *United States v. Standard Oil Co.*, 332 U.S. 301, 307, 67 S.Ct. 1604, 91 L.Ed. 2067 (1947); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367, 63 S.Ct. 573, 87 L.Ed. 838 (1943); *Texas v. Pankey*, 441 F.2d 236, 241 (10th Cir. 1971).

[9] *United States v. Yazell*, 382 U.S. 341, 352-58, 86 S.Ct. 1301, 16 L.Ed.2d 369 (1966); *Bank of America v. Parnell*, 352 U.S. 29, 32-34, 77 S.Ct. 119, 1 L.Ed.2d 93 (1956).

[10] *Johnson v. Railway Express Agency*, ____ U.S. ___, ___, 95 S.Ct. 1716, 1722-1723, 44 L.Ed.2d 295 (1975); *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68, 86 S.Ct. 1301, 16 L.Ed.2d 369 (1966); *Dice v. Akron, C. & Y.R. Co.*, 342 U.S. 359, 361-63, 72 S.Ct. 312, 96 L.Ed. 398

(1952).

[11] See generally *Federal Judicial Center Report of the Study Group on the Case Load of the Supreme Court* (1972); Stern, *Denial of Certiorari Despite a Conflict*, 66 Harv.L.Rev. 465 (1953).

[12] In *Zenith*, the Court also rejected two of the three types of state rules on the subject for the reason that they would frustrate policies underlying the federal antitrust laws:

> "To adopt the ancient common-law rule would frustrate . . . partial settlements, and thereby promote litigation, while adoption of the First Restatement rule would create a trap for unwary plaintiffs' attorneys." 401 U.S. at 347, 91 S.Ct. at 810.

[13] "[A] decision to apply state law as a matter of federal judicial incorporation may frequently be made as to a single issue at a time . . . .. Whether state law is to be incorporated as a matter of federal common law . . . involves . . . the relationship of a particular issue to a going federal program . . .. [T]he determination of one issue's relationship to the going program will not necessarily determine the relevance of the other issues in the same substantive area . . .." Mishkin, *The variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U.Pa. L.Rev. 797, 804-05 (1957) (footnote omitted).

[14]This case emphasizes the desirability of following state law in interpreting a release where, as here, such a course does not contravene federal policy.

[15]If a state law is to govern the instant case, it is clearly Pennsylvania law which should be applied. Both parties' briefs seem to make that assumption and the facts indicate that Pennsylvania is the only state concerned with the transaction. Three Rivers Motors' sole place of business was in Pennsylvania, the release contract was signed in Pennsylvania and the antitrust violation which economically injured Three Rivers was allegedly committed by a Ford-owned dealership operating in Pennsylvania. Having concluded that no state, other than Pennsylvania has an interest in having its law applied, it becomes unnecessary to determine whether federal or state choice-of-law principles would have been employed to determine which state's substantive law to apply. See Generally Note, *Applicability of State Conflicts Rules When Issues of State Law Arise in Federal Question Cases*, 68 Harv.L.Rev. 1212 (1955). Compare *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941) (holding that when federal courts decide matters within the scope of the *Erie* doctrine, they must employ the choice-of-law rules of the state in which they sit).

[16]At least one commentator has similarly concluded that state law should generally govern the construction of antitrust releases:

"The issues concerning releases [of antitrust claims] rarely present justification for applying a federal rule, either to achieve uniformity or to further antitrust policy. A release is an independent contract entered into voluntarily as a result of arm's-length bargaining, subsequent to the accrual of the federal right to recover. Presumably, the injured party has been compensated by the settlement, and the violator has suffered the sanction, even if somewhat mitigated by out-of-court compromise. Federal policy would not seem to insist upon the injured party's undergoing the burden of litigation, and should not require the condemnation of releases which are valid under state law. Similarly, defenses sufficient to avoid releases under state law should be upheld. The antitrust purposes do demand that the courts be alert to the possibility of fraudulently obtained releases, but state laws overwhelmingly hold such releases invalid. Should an occasional state rule be so harsh or unusual as to frustrate the intent of the statute, it can properly be disregarded." Note, *The Role of State Law in Federal Antitrust Treble Damage Actions*, 75 Harv.L.Rev. 1395, 1405 (1962)(footnotes omitted).

[17]The Pennsylvania Supreme Court has stated:

"As to the defense of duress, the Superior Court, in *Smith v. Lenchner*, 204 Pa.Super. 500, 504, 205 A.2d 626

(1964), aptly stated the applicable law as follows: 'We perceive no merit in appellee's contention that he was under duress when he executed and delivered the note in question. The threat purportedly made by appellant was not of physical violence or of criminal process, indeed not even of civil process. . . . Duress has been defined as that degree of restraint or danger, either actually inflicted or threatened and impending, which is sufficient in severity or apprehension to overcome the mind of a person of ordinary firmness: [citing cases]. The quality of firmness is assumed to exist in every person competent to contract, unless it appears that by reason of old age or other sufficient cause he is weak or infirm: [citing a case]. Where persons deal with each other on equal terms and at arm's length, there is a presumption that the person alleging duress possesses ordinary firmness: [citing a case]. Moreover, *in the absence of threats of actual bodily harm* there can be no duress where the contracting party is free to consult with counsel: [citing cases].'" *Carrier v. Wm. Penn Broadcasting Co.*, 426 Pa. 427, 430-31, 233 A.2d 519, 521 (1967) (emphasis supplied).

[18]*Three Rivers Motors Co. v. Ford Motor Co.*, 374 F.Supp. 620, 631 (W.D. Pa. 1974).

[19]*Id.* at 629.

[20]Cf. *Robert F. Felte, Inc. v. White*, 451

Pa. 137, 143-44, 302 A.2d 347 (1973).

[21]374 F.Supp. at 629.

[22]*Id.* at 631.

[23]*Id.* at 633.

[24]Mr. Winterhalter's alleged lack of knowledge was offered as extrinsic evidence only in connection with proving the parties' intentions and not as evidence of a mutual mistake of fact. Thus, the District Court correctly concluded that "[t]here was no indication of any fraud, accident, mistake or misrepresentation." *Id.* at 623.

[25]See 374 F.Supp. at 629, 630.

[26]See also *Dura Electric Lamp Co. v. Westinghouse Electric Corp.*, 249 F.2d 5 (3d Cir. 1957) wherein Circuit Judge Goodrich examined a remarkably similar release and concluded:

> "The document of release, which sounds as though it had been taken from an old form book, is as broad as all out of doors and typical of the wasteful use of words in the English language in which lawyers sometimes indulge. It is the heart of the case but setting it out does not carry the court's approval of it as a piece of English composition.
>
> "It is to be noted that the language of the release is as general as language can be. There is nothing by which it may be interpreted as a cove-

nant not to sue. There is nothing which even hints at a reservation of rights." 249 F.2d at 6-7 (footnote omitted).

See also cases cited in *Duffy Theatres, Inc. v. Griffith Consol. Theatres, Inc.*, 208 F.2d 316, 323-24 nn.5-7 (10th Cir. 1953). The *Dura Electric* release is reproduced in full in 249 F.2d at 7 n.2.

[27]Upholding the validity of the release in these circumstances does not offend public policy. We agree with those courts which have held that there is nothing in the public policy behind antitrust laws that prohibits general releases encompassing antitrust claims, provided that the release does not seek to waive damages from future violations of antitrust laws. See *Redel's Inc. v. General Electric Corp.*, 498 F.2d 95 (5th Cir. 1974); *Virginia Impression Products Co. v. SCM Corp.*, 448 F.2d 262 (4th Cir. 1971), *cert. denied*, 405 U.S. 936, 92 S.Ct. 945, 30 L.Ed.2d 811 (1972); *Gaines v. Carrollton Tobacco Bd. of Trade, Inc.*, 386 F.2d 757 (6th Cir. 1967); *Duffy Theatres, Inc. v. Griffith Consol. Theatres, Inc.*, 208 F.2d 316 (10th Cir. 1953), *cert. denied*, 347 U.S. 935, 74 S.Ct. 629, 98 L.Ed. 1085 (1954). Here, the release was not to have prospective application as it released Three Rivers' and its successors' claims or causes of action which they "ever had, now have or which they . . can, shall or may have, upon or by reason of any matter . . . whatsoever *from the beginning of the world*

to the date of these presents . . . ." (emphasis supplied).